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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-753**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 561 F.2d 1223. It is reproduced at pp. 1-53 of the separately-bound appendix filed with this Petition (hereafter cited as "App."). The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is officially reported at 410 F.Supp. 541, and is reproduced at App. 55-80.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 20, 1977. On November 8, 1977 Mr. Justice Stevens entered an order extending the time for filing this Petition to November 25, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Does an employee's coverage under an employer funded pension plan, as a compulsory incident of his employment, involve the "sale" of a "security" to the employee and hence a transaction subject to the federal securities laws? If so, can a cause of action be posited on each of the several antifraud provisions of those laws by one who alleges that there were material misrepresentations and failures to disclose in connection with such a "sale?"

STATUTES AND RULE INVOLVED

This case involves §§ 2(1), 2(3), 3(a)(2), and 17(a) of the Securities Act of 1933, 48 Stat. 74 as amended (15 U.S.C. §§ 77a *et seq.*) and §§ 3(a)(10) and 10(b) of the Securities and Exchange Act of 1934, 48 Stat. 881 as amended (15 U.S.C. §§ 78a *et seq.*) and SEC Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. They are reproduced at App. 82 *et seq.*

STATEMENT OF THE CASE

1. Plaintiff's claim and the proceedings below.

Respondent John Daniel was denied a pension from the Local 705 International Brotherhood of Teamsters Pension Trust Fund because he failed to satisfy the pension plan's eligibility requirement with respect to continuity of service. He brought this class action under the anti-

fraud provisions of the federal securities laws¹ against the trustees of the Fund, Local 705, the International Brotherhood of Teamsters and others, alleging that he and others covered by the Local 705 pension plan are the victims of misleading statements and omissions to state material facts with respect to the plan's eligibility requirements. The complaint sought reformation of the plan so as to delete "all arbitrary length and continuity requirements" and judgment in the amount of "all pension benefits unlawfully denied Plaintiff and all other members of the class he represents" (C.A. App. 35a-36a).²

The complaint purported to satisfy the threshold requirements of the antifraud provisions—that there be a "sale" of a "security"—on the unprecedented theory that plaintiff Daniel and other employees in the group covered by the plan "have purchased and acquired an interest in [the plan] . . . by agreeing to provide their labor services to employers who have labor contracts" requiring such contributions (C.A. App. 34a). Defendants moved to dismiss the securities counts on the ground that there is no "sale" of a "security" in connection with such a "compulsory noncontributory" union pension plan, coverage under which is a compulsory incident of employment and which is wholly funded by employer contributions. The District Court accepted plaintiff's theory with some modification and denied the motion to dismiss. The

¹ Counts I and II of the complaint—which are the only claims in issue here—seek relief under § 10(b) of the Securities Exchange Act of 1934 (the "1934 Act") and SEC Rule 10b-5, and under § 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)) (the "1933 Act"). Mr. Daniel also seeks relief under the common law and under various provisions of the labor laws (see App. 5, n.3).

² "C.A. App." refers to the joint appendix in the Court of Appeals. The Securities and Exchange Commission will be referred to as "SEC"; its brief in the court below will be referred to as "SEC Br." Other references to "Br." preceded by a name will similarly refer to a brief filed in the court below by that party or *amicus*.

District Court, determined (1) that pension plans are securities (App. 68-72) and (2) that there is a "sale" of a collectively bargained pension plan when union members vote to ratify an agreement negotiated by their union, if that agreement provides for employer contributions to a pension fund (App. 72-75). The Court was undeterred by its recognition that "the SEC had taken the position that with respect to those employee pension plans characterized as 'involuntary' or 'noncontributory' there is no sale within the meaning of the Securities Acts." (App. 73). The Court of Appeals affirmed on interlocutory appeal under 28 U.S.C. § 1292(b); the majority opinion, based on a theory of "sale" different from the District Court's, is described at pp. 8-9, *infra*.

2. Essential characteristics of a compulsory noncontributory union pension plan.

The organization and funding of the Local 705 plan are generally typical of collectively-bargained compulsory noncontributory plans.

The Local 705 Pension Trust Fund was established and is maintained within the framework established by § 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5). Consistent with the standards set forth in § 302(c)(5) and other relevant requirements (most notably § 401 of the Internal Revenue Code), the Local 705 pension plan was created by a Trust Agreement between Local 705 and certain employer groups (C.A. App. 62a, 64a, 72a-7). As is typical of such agreements the Board of Trustees (composed equally of employer and union representatives) was charged with formulation of "a plan for the payment of such retirement pension benefits, permanent disability pension benefits and death benefits as feasible," with the basic purpose as follows:

"to pay the largest benefits possible which are consistent with the number of members becoming and

likely to become eligible for such payments, the amount of funds which are available and which will probably become available, and the following of sound actuarial practice." (C.A. App. 64a-6, 7.)

The Agreement further made clear that "[n]o employee, or other person shall have any vested interest or right in the Trust Fund or in any payments from the Trust Fund" until such time as he has become eligible for the specified benefits under the terms of the plan. (C.A. App. 64a-7).³

The Pension Plan—again typically—provides that each "Employer shall pay to the Fund on behalf of each regular employee per week the sum specified in the collective bargaining agreement between the Union and the Employer for any week in which the employee performs any services for the employer * * *" (C.A. App. 72a-21). Employee coverage is "compulsory"—that is, an individual employee has no option as to whether they will be made on account of his services; they are also "noncontributory." The employer contribution level is established by the collective bargaining agreement, which is negotiated as a whole between the union as the statutory bargaining representative and multi-employer bargaining associations. Like other such plans, the Local 705 Pension Plan fixes the level of pension benefits and specifies detailed eligibility requirements based on length of service, continuity of service and age. Compare *Johnson v. Botica*, 537 F.2d 930, 932-933, 936-937 (C.A. 7).

Section 302(c)(5) permits pension benefits to be paid "either from principal or income or both." The actuarial factors that determine the rate of pension payments that can be given to retirees under a trustee-managed

³ Although it repeatedly stated that pension plan participants receive an "interest", the court below did not dispute—though it discounted—the proposition that employees have only "a contingent expectancy of receiving pension payments at a future date." (App. 16).

plan are enumerated as follows by a leading text, Melone, *Collectively Bargained Multi-Employer Pension Plans*, Pension Research Council, Wharton School of Finance and Commerce (Homewood, Ill., Richard D. Irwin, Inc., 1963): (1) "[t]he mortality experience of both active employees and pensioners"; (2) "turnover" by "[e]mployees who terminate their coverage under the plan for reasons other than death or retirement"; (3) "investment income earned on the accumulated assets of [the] * * * fund"; (4) "the expense of administering a pension program"; (5) "[t]he age at which employees retire"; (6) employers' "future contribution levels", which are "one of the most important factors." *Id.* at 77-85. Melone further notes the actuarial impact of the "initial accrued liability" for employees who—like Mr. Daniel—are given pension credit for employment prior to the commencement of contributions.⁴ *Id.* at 88-89. Reemphasizing the importance of future employer contributions, he notes that "either contributions or benefits may have to be adjusted according to the experience over a long period" in order to keep the pension plan solvent and provide continuing benefits at appropriate levels. *Id.* at 94.

While investment income is a factor in determining the amount of pension benefits that can be paid to retirees, benefits come largely from contributions made with respect to work performed by employees who for one reason or another never become pensioners and from contributions made with respect to work performed by employees who are still working at the time of payment of pension benefits to retirees. See also, generally, Bernstein, *The Future of Private Pensions* (New York, N.Y., The Free Press of Glencoe, 1964), pp. 39-46; Allen, Melone & Rosenbloom, *Pension Planning* (Homewood,

⁴ At the time of creation of the Local 705 Pension Fund, Mr. Daniel received full credit for his five years of prior service, service for which no contributions had been made.

Ill., Richard D. Irwin, Inc., 1976), pp. 72-77. See also C.A. App. 144a-146a, 149a-150a.

The relative significance of investment income and the other factors for pension benefits is concretely exemplified by uncontested data subsequently submitted to the district court in connection with the class action motion. That data shows, *inter alia*, that an employee retiring in 1975 under the Local 705 Pension Plan had retirement benefits with a then current actuarial value of \$57,951, of which only \$14,542 was attributable to contributions to the fund resulting from his own employment and interest on those contributions (C.A. App. 184a-8). In other words, only one-fourth of the actuarial value of his expected pension benefits was in any way traceable to his own employment, and the remaining three-fourths resulted from contributions made with respect to other employees covered by the plan.

3. Proceedings in the Court of Appeals.

The defendants sought and were granted leave to appeal under 28 U.S.C. § 1292(b) from so much of the order as denied the motions to dismiss the securities laws counts. In the Court of Appeals, the Department of Labor filed a brief *amicus* in support of the defendants' position; the SEC filed a brief *amicus* in support of the appellee. These agencies also presented oral argument. Two additional briefs *amicus* were filed on appellants' side and three on appellee's side. The *amici* were in accord on one proposition: the extraordinary importance of the District Court's ruling that pension plans such as that in this case are subject to the securities laws.⁵ Plaintiff's counsel agreed, stating that this is "an exceptional and important case."⁶

⁵ Pertinent excerpts from the submissions of the *amici* are set forth at nn.11-13 of the Local 705 Petition herein.

⁶ Plaintiff's Response to Petition for Permission to Appeal at 17.

The Court of Appeals affirmed. In an opinion by Judge Cummings, the court agreed with the District Court that "Plaintiff's interest in the pension fund is a 'security'" (App. 11). It characterized the union member as an "investor" (App. 13-17), and concluded that the *Howey*⁷ standards for an "investment contract" were satisfied (App. 17-21). The court concluded also that "plaintiff's security was acquired in a 'sale'" (App. 34). But unlike the District Court, it determined that there is the sale of an interest in a pension plan whenever an employee accepts or remains in employment covered by a pension plan.⁸ The court determined there was a sale not only for purposes of § 10(b) of the 1934 Act, but also under § 17(a) of the 1933 Act which it held, in accordance with prior Seventh Circuit decisions, creates an implied private cause of action. (App. 39-42)

The Court of Appeals incorrectly stated that "defendants and *amici* who support their position urge that the Employment Retirement Income Security Act of 1974 (ERISA) has repealed the anti-fraud provisions of the 1933 and 1934 Acts insofar as they apply to union pension funds," and went on to conclude that ERISA did not effect such a repeal. (App. 42, footnote omitted.) Actually, the argument was that Congress had enacted ERISA with the understanding that the securities laws were inapplicable to the relationship between plans such as this and their participants and that this Congressional action should be respected in construing the securities laws, particularly since securities law coverage would conflict with several policy decisions Congress had made in en-

⁷ See *SEC v. W. J. Howey Co.*, 328 U.S. 293, 301 approved in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852.

⁸ The court did not expressly approve or disapprove the district court's theory that ratification of a collective bargaining agreement which provides for employer contributions to a pension plan constitutes a sale. To this, it stated only that such ratification establishes the volitional element, if such is necessary for a "sale." (App. 36-37).

acting ERISA. Yet, the court made a policy judgment that the anti-fraud provisions of the securities laws would provide a desirable addition to the ERISA requirements. (App. 46-48). To the extent it discussed the demonstration by defendants and *amici* on their side that affirmance of the District Court's decision would create enormous potential liabilities for all pension funds, the court's opinion characterized those arguments as a "parade of horrors" and dismissed them out of hand as the product of the "zeal [of] advocates." (App. 49-50).

Judge Tone filed a separate concurring opinion in which he professed "certain doubts" about the opinion of the court, calling this "a close and difficult case." He said that some of his doubts flowed from the "ordinary meaning" of the words employed in the federal securities laws and from "Congress' basic purpose in adopting" those laws. He also indicated some discomfort with "attempts to stretch the securities laws beyond their traditional scope" and acknowledged this Court's recent decisions indicating "pronounced disfavor" with such attempts. (App. 51). He expressed a quite different view of the SEC's historical and present position regarding the securities laws' applicability to noncontributory pension plans than that stated by Judge Cummings (Compare App. 52 with App. 25-27), protested that the "Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position" (App. 52), and agreed with the defendants that "[m]embers of Congress considering legislative proposals after the adoption of the securities acts who relied on the SEC's interpretation of those acts must have understood that they did not apply to transactions of the kind before [the court]." *Id.* He concluded, however, that Congress should be deemed to have left the matter in a posture where the applicability of the securities laws to noncontributory pension plans would be "determined by the Supreme Court" (App. 53).

REASONS FOR GRANTING THE WRIT

THE UNPRECEDENTED AND UNWARRANTED EXPANSION OF THE SECURITIES LAWS BY THE COURT BELOW CREATES IMMEDIATE AND SERIOUS DIFFICULTIES FOR THE FINANCIAL STABILITY AND ADMINISTRATION OF THE ENTIRE PRIVATE PENSION SYSTEM

Introduction

One knowledgeable court has observed:

The securities laws in question, designed to safeguard the integrity of investment decisions, have been in operation for over forty years. Yet until the 1975 decision in *Daniel* * * * no court had ever held, nor apparently had anyone including the SEC the temerity to argue that an interest in an involuntary, noncontributory pension or health benefit plan was covered by the securities laws. Congress has repeatedly indicated its belief to the contrary.⁹

The novelty of the decision below raises the suspicion that once again, as in *Forman*,¹⁰ *Blue Chip*,¹¹ *Hochfelder*,¹² and *Green*,¹³ a lower court has expanded the securities laws to achieve a result which Congress never intended. And the fact that Congress, acting on the clearly expressed understanding that it was filling a statutory vacuum, has twice enacted legislation which dealt with

⁹ *Robinson v. United Mine Workers of America, etc.*, 435 F.Supp. 245-247 (D.D.C., Gesell, J.) (footnote omitted). Judge Gesell's surprise doubtless stemmed in part from his own experience as an attorney at the SEC from 1935-1940, and as Technical Assistant to its Chairman from 1940-1941. See 1 *Who's Who in America*, 1137 (1977).

¹⁰ *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837.

¹¹ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723.

¹² *Ernst & Ernst v. Hochfelder*, 425 U.S. 185.

¹³ *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462.

the precise problem of the nature and timing of disclosure to which participants and beneficiaries in collectively bargained and other involuntary noncontributory pension plans are entitled, is itself, as we shall develop, a powerful reason why the judiciary should not now pour new wine into these 40-year-old bottles. But the principal reason why certiorari should be granted is that the Court of Appeals' sharp reversal of the prior understanding creates immediate and enormous uncertainty and confusion which will burden employers, labor unions, pension fund trustees and plan administrators, the executive departments and the courts until this Court authoritatively determines whether the securities laws cover the relationship between involuntary noncontributory pension plans and their participants. Because they deem the securities laws to be inapplicable, pension plan administrators have uniformly failed to make disclosures to employees at the times and in the detail which is required under the theory of the decision below. Their funds, aggregating over \$150 million (App. 24) are subject by the decision below to vast retroactive liabilities because of noncompliance with these laws. If the decision below is unreviewed, they must determine whether and in what amount they should account for these contingent liabilities, and whether they should now undertake the expensive and burdensome obligations to which they are not properly subject if the decision below was wrong. Their problems will be compounded because compliance with new disclosure obligations based on a broad and undefined securities law standard of materiality will have to be superimposed upon the existing disclosure and regulatory system created in 1958 and greatly expanded in 1974, a system in which Congress has dealt with the precise nature and timing of disclosures to which such participants and beneficiaries are entitled.

In Part I of our Argument we describe these serious adverse consequences in greater detail. In Part II we urge the substantiality of the question presented, showing first that the decision below is inconsistent with this Court's precedents construing the securities laws and second that it contravenes the prior universal understanding of the coverage of the securities laws, which Congress shared when it enacted two laws which deal specifically with disclosure by pension plans to their participants.

I. THE DECISION BELOW CREATES IMMEDIATE ADVERSE CONSEQUENCES FOR ALL INVOLUNTARY NONCONTRIBUTORY PENSION PLANS.

For over 40 years, employers, unions and pension fund trustees and plan administrators have operated under the belief that the federal securities laws are not applicable to the transactions whereby an employee accepts employment, or continues in employment, or votes on a collective bargaining agreement providing for employer contributions to a compulsory pension fund. As a consequence, they have not acted with the perception that they were selling a security. Certainly, they did not anticipate that they had the duty to disclose those matters which the court below suggested should have been disclosed. For example, it is doubtful that any of them have ever furnished actuarial data and assumptions to employees and prospective employees, yet the opinion below is replete with assertions that compliance with the antifraud provisions of the securities laws would have required such disclosures supposedly because they would enable such employees to determine their "risk of loss." (App. 8, 46, 47).

Pension funds' potential exposure is not limited to claims by those who, like Daniel, have failed to receive their pensions because of the operation of qualifying pro-

visions like break-in-service rules. The actuarial premises by which the amount of requisite employer contributions to a pension fund is determined in order to provide the anticipated benefit always include an assumption that a substantial amount of contributions will be made with respect to the labor of those who will leave their employment prior to vesting, and in fact a very large portion of fund assets available to pay pensions is derived from contributions made with respect to the employment of those who move on to other jobs. All such employees could now contend that the non-disclosure of such actuarial assumptions was a violation of the antifraud provisions of the securities laws as to them and that they were therefore entitled to damages equal to the amounts paid into the funds by reason of their employment.

Further, it would be a rare fund indeed which would have advised employee participants of the "success or failure" of the trustees' management or of the type of investments which were made, information which, as the court below notes, plaintiff complains that he never received (App. 7).

Nor do the opinions below represent the outer limits of what it will now be contended should have been, but was not said to plan participants, for as the Court of Appeals observed:

When, as is often the case, the communication material [was] prepared by persons not thoroughly cognizant of the technical and legal nature of plan provisions, the result can easily become a document subject to criticism as incomplete and misleading. (App. 38, n.42, quoting ERISA testimony on behalf of the American Society for Personnel Administration).

To this point our discussion has related only to the view of the court below that the antifraud provisions of the federal securities laws are applicable. The problems

created by this exposure to damage actions are problems enough, but the problems do not stop there.

A determination of securities law coverage inevitably gives rise to the question whether the registration requirements of § 5 of the 1933 Act are applicable. The Court of Appeals gave three different answers to that question. First, at App. 27, note 32, it declared: "[T]he registration provisions of the 1933 Act do not apply to securities consisting of interests in pension plans." It promised to "show [why] in the opinion," but it did not, because it could not. Rather, in the immediately following discussion it relied on § 3(a)(2) of the 1933 Act as amended in 1970¹⁴ which, whatever else it may mean, is in terms limited to funds "maintained by a bank" or by an insurance company¹⁵ (App. 29). It then tried to give comfort by quoting plaintiff's brief for the otherwise unsupported proposition that "because most employee pension plans are bank maintained, registration is not required for most employee pension plans." (App. 29, n.35, quoting Plaintiff's Br. 37-38). However, the requirement that a "trust fund [be] maintained by a bank," the key to § 3(a)(2) exemption, is not satisfied merely by having a bank account, the seeming predicate for plaintiff's claim that "most" plans are exempt from registration. In fact, the SEC's staff has interpreted the exemption available to trust funds maintained by a bank "to be unavailable where a trustee bank acts as a mere custodian . . . and does not exer-

¹⁴ As the court itself recognized, the SEC has no general power to create exemptions from the registration requirements of the 1933 Act (App. 29, n. 34).

¹⁵ In fact, § 3(a)(2) has nothing whatever to do with employee interests in a pension fund. It pertains only to dealings between banks and insurance companies on the one hand and those who establish or manage pension funds on the other hand with respect to the investment of pension fund assets. (See p. 38, n.53, *infra* and pp. 22-28 of the Local 705 Petition.)

cise substantial investment responsibility."¹⁶ Minimally, this would rule out funds which had their own investment manager or which used outside advisers which were not banks.¹⁷ While petitioner does not have information which would show the number of pension funds that have all of their assets managed by other than banks or insurance companies, a study issued by the SEC itself shows that at the end of 1975, of the aggregate \$145.6 billion asset value of all private noninsured pension funds, only \$93.5 billion were managed by banks and trust companies. Thus, funds with assets of at least \$50 billion would be nonexempt from registration, even if § 3(a)(2) were construed as exempting from registration all pension funds "maintained by a bank or in a separate account maintained by an insurance company." See SEC 35 Statistical Bulletin 552 (November, 1976).

Apparently uncomfortable with an interpretation which affords exemption from registration only to those plans which are "bank maintained," the court later took a different tack and suggested that: "Because of the long time and consistent administrative practice [of not requiring registration], these pension funds might be deemed beyond the scope of the registration requirements even if they are not already exempted by [§ 3(a)(2)]" (App. 50, n.61). The court then reiterated the unsupported assumption that "most [pension] funds . . . are invested by the trust department of major banks"

¹⁶ *Sterling National Bank & Trust Co.*, 1975-1976 Transfer Binder, CCH Fed. Sec. L. Rep., ¶ 80,433 (Feb. 10, 1976); See also *Bank of America*, 1971-72 Transfer Binder, CCH Fed. Sec. L. Rep., ¶ 78,614 (Dec. 8, 1971).

¹⁷ The court below observed that a "portion of local 705 Pension Fund is maintained by the trust department of major Chicago banks." (App. 29, n.35). The balance is self-invested by the trustees largely in United States Government obligations. The court did not answer the question of whether or not this qualifies the Local 705 fund as one which is "maintained by a bank" within the meaning of Section 3(a)(2). (App. 29).

and stated that this is "apparently" why the SEC maintains that 96% of all pensions are "so exempted" (*Id.*) Yet in the same breath it quoted language from the SEC brief showing that the 96% estimate is the percentage of all pension plans which are qualified under the Internal Revenue Code. (*Id.*)

Given the inconsistent, unsupported and problematical attempts of the court below to limit the potential impact of the registration provisions of the Act, it is not surprising that commentators on the opinion question whether there is any way to "carve up" the securities laws so that the antifraud provisions are applicable to pension fund interests but the registration provisions are not. Hence they foresee little protection from contentions that many if not most funds should have registered if the securities laws are applicable at all.¹⁸ While it is understandable that the SEC does not so contend, given its immediate objective here, nothing bars private litigants, especially with class action incentives, from so doing.

It is not necessary to quantify the potential liabilities for past omissions to realize that they are substantial and far-reaching as well as inconsistent with Congress's determination that pension funds should not be burdened with the financial consequence of retroactive application of new rules.¹⁹ Nor will the adverse impact of the decision below be confined to the pension funds themselves, for the opinions below have already inspired additional lawsuits and undoubtedly will continue to spawn still

¹⁸ B. W. Nimkin, BNA Pension Reporter No. 155, p. A-12-13 (Sept. 19, 1977); William J. Chadwick, Pensions and Investments, p. 3 (Sept. 26, 1977).

¹⁹ II Legislative History of the Employee Retirement Income Security Act of 1974 (G.P.O., 1976) (hereinafter, "ERISA Leg. Hist.") at 3177.

more. Petitioner cannot develop a complete list of post-*Daniel* actions which are based in whole or in part on the claim that the federal securities laws are applicable to employee coverage under pension or welfare plans. However, the seventeen cases listed in Appendix A hereto in which petitioner has been named a party and other cases brought to its attention by the bar, suggest the dimensions of the problem.

The burden imposed upon the federal courts by garbing a state common law fraud claim in the trappings of federal jurisdiction, is not lightly assumed. Cf. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477; *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 40. The cost of bearing that burden must be reckoned in the overloading of judges with a consequent reduction of time and attention to those matters which are properly and traditionally the province of the federal judicial system.²⁰ The problem is exacerbated when actions can be filed and maintained as class actions, as has already happened here.²¹

²⁰ The complaint in *Daniel* asserts federal causes of action arising under § 9(a) of the National Labor Relations Act and § 302(c) (5) of the Taft-Hartley Act as independent bases for federal jurisdiction. However, the causes of action under the federal securities laws are obviously of far greater interest to plaintiff as a class representative and add a substantially broader dimension to the case.

²¹ In *Daniel* itself, the District Judge has certified a class consisting of

"All persons (1) who are now, or who were, members of Local 705 of the IBT, and (2) who have purchased or otherwise acquired an interest in, through a contribution to or on whose behalf a contribution has been made to, the Local 705 Pension Fund, which requires for the payment of a full retirement benefit a total period of service in excess of twenty (20) years."

This class numbers over 15,000 persons. In certifying the class, the Judge did not say how the action will be managed if "[p]articular employees must show in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing him injury" or how he and the litigants will deal with such ques-

The impact of considerations of past liability is only half the story. If *Daniel* is not reviewed and reversed, the pension fund community must then consider whether, when and how it should comply with the opinions below.

The SEC's brief below dealt with the subject of what affirmative disclosures pension funds must make to avoid antifraud liability with carefully equivocated minimizations,²² and the court below asserted that not much would be required. (App. 44, 48-50) The bar, understandably, takes a more cautious view.

Despite the Seventh Circuit's comforting comments regarding the burdens imposed by its decisions [sic] the impact on the collective bargaining process is likely to be significant.

* * *

Adequate disclosure under the federal securities laws of contracts as complicated as a pension plan and trust agreement cannot be lightly effected, and generally require extremely careful drafting. * * *

Dan L. Goldwasser, *Pension & Executive Compensation* '77, New York Law Journal (October 3, 1977), p. 29.

tions as whether a particular employee was aware of a plan's "key requirements," or whether a particular employee can establish the factual prerequisites for tolling the "applicable statute of limitations as to him," issues which the Court of Appeals says are still to be resolved. (App. 50-51)

²² E.g.: "The antifraud provisions, by contrast [with registration provisions], do not establish a system for affirmative disclosure consisting of the preparation or filing of documents. While they could, under some circumstances, require that a person make affirmative disclosures (which may be oral or written) necessary in order not to mislead a securities purchaser, the antifraud provisions are essentially a generalized prohibition against fraudulent activity." (SEC Br. 5 emphasis added).

"[T]he antifraud provisions do not constitute a general requirement of detailed affirmative disclosure, either oral or written." (SEC Br. 58 emphasis added)."

Aside from disclosures with respect to the plans themselves, the Court of Appeals' desideratum of a "self-executing compulsion to disclose" what it dubs the "statistically determinable risk that many employees covered by a plan will never receive their pension benefits" (App. 46-47, see also *id.* 8, 50), creates a real dilemma. Actuarial assumptions are not actuarial facts. Even when they are based upon experience data, they speak of a statistical universe. An actuarial assumption that half of the employees upon whose employment contributions are paid will move on to other jobs before vesting occurs says little or nothing to a 40-year-old who is prepared to make a career decision. Indeed, providing such data to a 40-year-old employee could be misleading where the assumption, or even the data upon which it is based, is heavily weighted by the mobility of the 20 to 30 year group. Similar problems arise when the statistical universe embraces categories as diverse as laborers and general foremen, as it so often does. Lawyers practised in securities law compliance could opt to protect a pension fund from potential future liability by providing employees with verbatim copies of complex actuarial reports with the caveats that what is submitted (a) is based generally not on fact but assumption, (b) to the extent it is based on past data, is not necessarily predictive of the future, and (c) may have no bearing as to that particular individual. They would then ask "what other 'disclosures' should be made to avoid liability where the only limiting factor to contentions of non-disclosure is the imagination of counsel for potential plaintiffs"? The only safety would appear to be in an equally boundless anticipation. That is the securities laws approach.

This is not what Congress has prescribed. Congress's response to the acknowledged inadequacies of pension fund disclosures to employees was to enact ERISA with its carefully prescribed disclosure requirements. The key disclosure document under ERISA is the "summary plan

description" which must "be written in a manner calculated to be understood by the average plan participant" and must cover precisely described categories of information. ERISA, § 102, 29 U.S.C. § 1022. The problems attendant upon reconciling the disclosure requirements of ERISA with the additional requirements imposed by application of the federal securities laws are numerous.²³ Even the question of when disclosures are required to be made is now in doubt.²⁴ And, of course, there is the entire problem of whether SEC registration is required, see pp. 14-16, *supra*.

One of Congress' principal objectives in enacting ERISA was "to reduce duplication of effort . . ., duplication of reporting, conflicting or overlapping requirements, and the burden of compliance with such provisions by plan administrators [and] employers . . ." ERISA, Section 3004(a). The impressing of securities laws requirements and potential Securities and Exchange Commission regulation upon that required under ERISA and regulated by the Department of Labor and the Internal Revenue Service flies in the face of this Congressional objective.

Compliance with ERISA and the regulations enacted thereunder should have produced a state of relative as-

²³ One authority has observed that "[u]nder the securities laws, additional disclosures may be required in order to make those mandated under ERISA not misleading." Dan L. Goldwasser, *Pension & Executive Compensation*, '77, op. cit. p. 18, *supra* at 10.

²⁴ The SEC argued below that "a sale occurs when the employee decides to take or keep a job . . ." (SEC Br. 59, see also *id.* 41, 49, 51). The Court of Appeals adopted this view and the concomitant that "material facts, including, of course, risk of loss, be disclosed prior to the investment decision" (App. 46). More recently the Chairman of the SEC, seeking to assuage the questioning Chairman of the Senate Human Resources Subcommittee on Labor, has said that the antifraud provisions of the securities laws could be satisfied by disclosure made 90 days after employment (as ERISA provides) and stated that he does not read the opinion below as requiring pre-employment notification. BNA Pension Reporter, No. 159, p. A-16 (October 17, 1977). Such inconsistencies serve to intensify the problems that *Daniel* has created.

surance for those concerned with pensions. Instead, the opinion below has created a state of vast uncertainty as to what is now required, with regard to both substance and geographic applicability. Should *Daniel* be followed in the Seventh Circuit and ignored in California and the District of Columbia where four district court judges have held that the federal securities laws do not apply to interests in compulsory, noncontributory funds (see *Cinnamon*, *Hurn*, *Robinson* and *Wiens* cases cited in Appendix A)? If the answer is thought to be that *Daniel* need be followed only in the Seventh Circuit, how would that answer be applied where, as is so often the case, a single pension plan covers employees in a number of jurisdictions? Little wonder that one knowledgeable authority has said that *Daniel* "creates nightmares for large companies."²⁵

II. THE COURT OF APPEALS ERRED.

A. This Court's Precedents Preclude the Court of Appeals' Novel Holding That Compulsory Noncontributory Pension Plans Are Within the Scope of the Securities Laws.

1. In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 ("*Forman*"), this Court reversed a Second Circuit decision that "stock" purchased by occupants of a cooperative apartment project was a "security" as to which a private action could be brought under the securities laws. This Court's analysis in *Forman* compels disapproval also of the conclusion of the court below that a participant in an involuntary noncontributory pension plan acquires a "security." In *Forman*, this Court explained:

The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely un-

²⁵ Remarks of James D. Hutchinson, formerly Administrator of Pensions and Welfare Benefit Programs, Department of Labor, quoted in *Pensions and Investments* (September 26, 1977) p. 3.

regulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto. (*Id.* at 849).

The Court of Appeals failed to heed *Forman's* teaching that the "focus of the Acts" constitutes a significant restriction on their coverage.²⁶ The heart of the matter is that when an individual becomes a participant in an involuntary non-contributory pension plans he is not in the capital market; he is in the labor market. In his capacity as wage earner and potential pension beneficiary the employee is not an "investor" in any sense understood by Congress when it was protecting investors in the securities markets, and he does not acquire anything which can reasonably be assimilated to any of "—the many types of instruments that in our commercial world fall within the ordinary concept of a security" H.R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933), quoted in *Forman*, 421 U.S. at 847-848. And it likewise stretches these laws far beyond their original scope to hold, as the Court of Appeals did, that an individual's acceptance of or

²⁶ Viewed most narrowly, *Forman* is very much in point as illustrating this Court's certiorari policy, for there certiorari was granted "[i]n view of the importance of the issues presented. . . ." (421 U.S. at 847) The impact of this case on involuntary non-contributory pension plan parallels that of *Forman* on nonprofit cooperative housing corporations: here, as there, the issue is the basic one of securities laws coverage. Moreover, it cannot be gainsaid that the potential impact of the decision below is even greater than that of the decision reviewed in *Forman*, because pension plans which are now swept under the securities laws cover far more persons than occupy housing cooperatives.

remaining in covered employment gives rise to a "purchase" and "sale" of an interest or participation in a pension plan.

Even as the shareholders in *Forman* decided basically whether they wanted to live in a particular place, so the employee's decision here is whether he wishes to work for a particular employer. But the court below sought to differentiate the cases: "It is clear that the union member does not intend to purchase a commodity or realty for personal use; rather he parts with his money in the hope it, through the management of others, can fund his retirement." (App. 17, n.20) But this is simply contrary to fact. The employee does not part with money; he performs labor. The money which the fund receives is contributed by the employer for the benefit of the employee group as a whole; a particular employee cannot choose to receive it at the time he works and may have no expectation of ever receiving it.²⁷ The Court of Appeals has simply obliterated the essential differences between involuntary noncontributory plans and voluntary contributory plans. Its description also disregards a basic element of all collectively-bargained plans, namely that they are negotiated by a union as representative of the entire group, rather than of any individual.²⁸

2. *Forman* reaffirmed the proposition that coverage under the securities laws is to be determined according to the economic reality of the situation; the court below misperceived that reality in numerous respects, only some of which can be described in this Petition.

²⁷ This may occur because the employee does not intend to remain with the employer for a period sufficient to provide vesting, or because he became covered in his employment too late in life to achieve eligibility, or for numerous other reasons.

²⁸ Compare *Robinson, supra*, 435 F.Supp. at 247: "As in *Forman*, interests in the Trust are inalienable, and any surplus will be converted into extended benefits for all rather than invested for the individual miner's profit."

a. *Forman* teaches, by example, that "economic reality" is not preserved by taking a complex transaction, breaking it into small parts and then determining that the totality is covered by the securities laws because one element bears a resemblance to other transactions which are covered, but whose other characteristics are entirely different.²⁹ So here, the economic reality of the transaction is doubly distorted by characterizing an individual's acceptance and performance of a job which is covered by a collectively bargained pension plan as the "purchase" of a "security". First, it necessitates isolating from the employees' total compensation a single "fringe benefit", the employer's contribution to the pension plan. Second, it characterizes the employee's participation in the pension plan on the basis of a single factor which increases the amount of money in the pension fund—its investment performance—to the exclusion of other factors which are more important: the use of a pooled fund specifically authorized through § 302(c)(5) of the Taft-Hartley Act, where contributions are made with respect to the labor of individuals who will never be beneficiaries,³⁰ and the advantage of current contributions to the fund far in excess of those made when the beneficiary was acquiring eligibility. And it also excludes consideration of other far more important determinants of the amount of the benefit, if any, which the participant will ultimately receive: the participant's compliance with the eligibility requirements (which may be impossible through no fault of his own because he is discharged, or his em-

²⁹ Precisely such fragmentation was the line of analysis advocated by the SEC in *Forman* but rejected by this Court. See, 421 U.S. at 851-858. (Brief for the Securities and Exchange Commission, No. 74-157, Oct. Term, 1974, p. 17).

³⁰ See, e.g., *Johnson v. Botica*, 537 F.2d 930, 935-936 (CA 7); *Local Union No. 5, Sheet Metal Workers' International v. Mahoning and Trumbull County Building Trades Welfare Fund*, 541 F.2d 636 (CA 6). See also, *Walsh v. Schlecht*, 429 U.S. 401, 408-410.

ployer goes out of business); the award of past service credits; the trustees' determination of how much can be paid, consistent with the interests of other participants, and the beneficiary's individual life expectancy. Each of these factors is entirely foreign to " * * * 'the many types of instruments that in our commercial world fall within the ordinary concept of a security.'" 421 U.S. at 847-848. While the SEC argued in *Forman* that "an investment contract type of security may exist where investors are motivated by any significant economic inducement"³¹ that view did not prevail.

b. Another misunderstanding of the nature of these plans appears in the court's rejection of the International's argument that there is no security because

employees do not even have an interest in the pension plan except in the attenuated sense that they have a contingent expectancy of receiving pension payments at a future date. (App. 16)

The court responds:

[M]ere contingent expectancies are the rule rather than the exception in the equity markets. Profits in an equity security require that the market value plus accrued dividends of a stock be greater than the stockholder's cash basis. Thus profits are contingent on the successful operation of the common enterprise, there the issuing corporation. (*Id.*)

But while a stockholder is not *assured of a profit* unless the enterprise is successful, even if it is unsuccessful he does own a present share of the enterprise, stock which he can sell for *some* money as long as the corporation is in existence, at least short of its bankruptcy. On the other hand, a participant in a pension plan can never convey any "interest" therein, no matter how successful

³¹ Brief for the Securities and Exchange Commission, No. 74-157, Oct. Term, 1974, p. 15. See also Brief for Respondents, *id.*, p. 27.

the pension fund is in accumulating earnings. And though conceding that the analogy it draws between covered employment before benefits vest and the situation of a stockholder forced to sell his stock at a net loss "is not exact", the court regards the difference to be immaterial:

[W]e think that a right to receive benefits, received as a form of compensation and not subject to unilateral withdrawal by the pension trustee or the employer, is a sufficient interest to constitute a security, even though it will only mature upon the happening of certain events in the future. (*Id.*)

But here again the court errs, because the right to receive benefits is subject to unilateral withdrawal by both pension trustees and the employer. The broad power of pension trustees to establish and modify pension eligibility requirements is well established.³² And there are many ways in which the employer can effectively destroy the potential eligibility of some or all of his employees.³³ Such action is completely unilateral where the employees are unrepresented; and even where the employees are represented, it is elementary that the employer is not obligated to acquiesce in the union's demands. See *e.g.*, *Porter Co. v. NLRB*, 397 U.S. 99, 109. Thus, where the obligation to contribute to the fund is established by collective bargaining, the employer can withdraw from the plan by agreement with the union (if it determines this to be in the employees' interest) or, if the union objects, by succeeding in a test of economic strength. Moreover, this Court has recognized the employer's unilateral right to go out of business, *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, which would likewise put an end to

³² See *e.g.*, *Pete v. United Mine Wkrs. of Am. Welf. & R.F.*, 517 F.2d 1275 (C.A.D.C.).

³³ ERISA, and perhaps § 302(c)(5) of the LMRA impose limitations on the power of employers or pension trustees to withdraw the right to a benefit or defeat the expectancy of a benefit.

that employer's funding of a single-employer plan or contributing to a multiemployer fund. So, too, the cases are unfortunately legion where an employer has shut down a plant, thereby depriving many employees of their jobs and their pension expectations as well.³⁴ And of course the employer can foreclose an individual employee from ever attaining eligibility by discharging him, which he may do unilaterally, except insofar as a collective bargaining agreement restricts the exercise of that power.

c. Economic reality is only camouflaged by calling a employee an "investor" who makes an "investment of money" by working in covered employment or by analogizing his participation in the pension plan to stock options,³⁵ bonds and debentures,³⁶ or mutual funds and

³⁴ See *e.g.*, *Malone v. White Motor Company*, No. 76-1184 cert. granted, 46 U.S.L.Wk. 3183, Oct. 3, 1977 to review 545 F.2d 599 (C.A. 8); *Dwyer v. Climatrol Industries, Inc.*, 544 F.2d 307 (C.A. 7), cert. denied, 430 U.S. 932; *Craig v. Bemis Co., Inc.*, 517 F.2d 677 (C.A. 5); *Knoll v. Phoenix Steel Corp.*, 465 F.2d 1128 (C.A. 3), cert. denied, 409 U.S. 1126; *Baake v. General American Transportation Corp.*, 351 F. Supp. 962 (N.D. Ill.).

While an employer is obligated to bargain about such a shutdown, a strike to prevent a shutdown will rarely if ever be successful, since the employees can only withhold labor which, by nature of the problem, the employer does not want.

³⁵ See App. 18-19, citing *Collins v. Rukin*, 342 F.Supp. 1282 (D. Mass.). All that case decided on this point was that "the Court declines to hold that the [employment] context as a matter of law requires that the explicit inclusion of stock options in the definitional sections of the 1933 and 1934 Acts be disregarded for the purpose of determining the question of subject matter jurisdiction." (*Id.* at 1288, emphasis added).

³⁶ See App. 19, n. 23, equating the "fixed return" of bonds and debentures with the fixed level of pension payments. But in bonds, etc., the amount of the return is fixed in the instrument, and therefore is known at the time of purchase, and depends on how much money the purchaser pays, for that determines the number of bonds he receives. In contrast, the amount of the monthly payment to beneficiaries is not fixed until the time of their retirement (that is, until the employee has completed the years of labor which the court below held to be his "purchase"), and the actual return which

variable annuities.³⁷ Such word play "ignore[s] the ancient wisdom that calling a thing by a name does not make it so." *Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 174.

d. Contrary to *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199, the court below took it upon itself to "add a gloss to the operative language of the statute quite different from its commonly accepted meaning" in order to conclude that there is a "purchase" and a "sale" within the meaning of § 10(b) of the 1934 Act and § 17 (a) of the 1933 Act whenever an individual accepts or remains in covered employment. Those terms do not describe every economic transaction in which an individual provides value for a return or for the expectation of a return. One would never say that an employee "purchases" his wages by performing labor; yet the Court of Appeals held that by performing labor an employee "purchases" an interest in a pension plan to which his

any individual will receive depends not only on the rate of payments, but also on whether he ever achieves eligibility and how long he lives thereafter. Further, bonds and debentures are ordinarily negotiable, and most significantly, are expressly included within the statutory definitions of "security."

³⁷ (App. 23). To enumerate just some of the differences between both of these investments and participation in a pension fund, a participant in a pension fund does not contribute specified sums of money, he may not sell, trade or redeem his interest, he does not have a proportionate share of the underlying portfolio and he does not entrust his personal capital to the pension plan administrators; moreover, the amount of his benefit is fixed by the trustees on the basis of numerous considerations which do not include the specific amount of money paid in because of his labor, but do include primarily the long term interests of the fund and other participants and the likelihood of continued or increased employer payments. (See pp. 24-25, *supra*). The income variances of the fund bear only a small, if any, relation to that ultimate fixed benefit. Unlike mutual funds and variable annuities, participations in a non-contributory pension plan represent a *collective* interest in an undivided fund.

employer contributes as partial compensation for his labor. Moreover, the terms "purchase" and "sale" normally connote that something has been conveyed from the seller to the purchaser (and usually in some direct relation to the amount of money paid by the purchaser). Yet the trustees of a pension plan convey no interest to an individual when he commences covered employment or when he performs labor thereunder; indeed, until he has stopped working (or "purchasing" under the usage of the court below) the employee can receive no benefits from the fund. In thus expanding coverage of the securities laws beyond the normal meaning of their language, the court violated the precepts of *Hochfelder*, *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472-474, and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733, n. 5, 749-751 (see also *id.* at 756-757, concurring opinion).³⁸

The result and reasoning of *Blue Chip* are especially in point in the present case. Since the Local 705 pension plan was established after Daniel commenced the employment on which he bases his eligibility (see p. 6, n.4, *supra*), it is insufficient for Daniel's claim to hold that acceptance of covered employment is a purchase; his cause of action depends on the further proposition that continuation in covered employment also constitutes a purchase. Yet, in this respect, he stands on no better footing than a stockholder allegedly lulled into keeping his monetary investment, who is denied standing to sue

³⁸ Section 2(a)(3) of the 1933 Act provides that "[t]he term 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security, for value." Sections 2(a)(13) and 2(a)(14) of the 1934 Act provide respectively that "[t]he terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire" and "[t]he terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of." As we have seen (p. 5, *supra*), there is no interest which an employee "acquires" or a pension fund "disposes of" when, according to the court below, a purchase and sale occurs.

by *Blue Chip*.³⁹ The decision below thus equates the acceptance of employment with the purchase of stock, but then treats continuation in employment *more favorably* for the purposes of standing under the securities laws than a decision to hold the stock. This is truly a paradoxical result, given that the securities laws were "designed to safeguard the integrity of *investment decisions*" (*Robinson v. UMW*, *supra*, 435 F.Supp. at 247, emphasis added).

Moreover, it is true here, as it was in *Blue Chip*, that recognizing the cause of action would create a "social cost rather than a benefit," 421 U.S. at 741, and for the same reasons: The holding that continuation in employment is a "purchase" "throw[s] open to the trier of fact many rather hazy issues of historical fact the proof of which depends almost entirely on oral testi-

³⁹ *Blue Chip* reserved the question whether a nonpurchaser could sue under § 17(a) of the 1933 Act. We believe that the result should be the same, at least with respect to involuntary noncontributory pension plans, because the language of the statutes is not materially different for present purposes, and because the problem of proof and other possibilities of abuse which were stressed in *Blue Chip* and are present here are identical if suit is brought under the 1933 Act.

In any event, there is a conflict among the circuits as to whether § 17(a) ever gives rise to a private cause of action. Compare the decision below with *Greater Iowa Corp. v. McLendon*, 378 F.2d 783 (C.A. 8), followed in *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 159 (C.A. 8). That issue is obviously a recurring and important one, which would merit this Court's attention even if it arose in a less important context than is presented by the broader issues of this case. The likewise important question of whether an implied private right of action arises under § 10(b) of the 1934 Act and Commission Rule 10b-5 for misrepresentations and omissions relating to such non-securities market contexts as becoming or remaining a participant in a compulsory non-contributory pension plan would also be reached if this Court were to conclude that a participation is a "security" and the transactions whereby that "security" is acquired is a "sale" within the meaning of the federal securities laws.

mony." (*Id.* at 743).⁴⁰ And since such "an action under Rule 10b-5 will turn largely on which oral version of a series of occurrences the jury may decide to credit, and therefore no matter how improbable the allegations of the plaintiff, the case will be virtually impossible to dispose of prior to trial other than by settlement" (*id.* at 742), the expense of defending against a 10b-5 claim would invariably be greater than paying a pension to a claimant even if he is ineligible under the pension plan's rules. Plan trustees will thus be put to the truly unenviable choice of spending the fund's assets to defend a lawsuit, or disregarding the plan's eligibility requirements. Under either choice, the individuals who do qualify under the plan's rules would be the ultimate losers, because less money would be available to pay their benefits.

⁴⁰ This point is further developed, *id.* at 746, in reasoning which is also directly in point:

Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representation contained in it damaged him.

Compare App. 6 where the court below took note of the statement in Daniel's affidavit that the Local 705 pension plan "was a material factor in his continuing employment with Local 705 covered employers [and that] if he had known that Local 705 would interpret the pension plan as requiring uninterrupted service of 20 years, he would have sought employment with an adequate retirement plan." And see App. 37, n. 41 where the court below observed that "Daniel's affidavit reveals material reliance on pension benefits in retaining his job."

In sum, even if participations in involuntary noncontributory pension plans are securities, "the inexorable broadening of the class of plaintiff who may sue in this area of the law will ultimately result in more harm than good." (*Id.* at 747-748, quoted with approval in *Hochfelder*, 425 U.S. at 214-215, n.33.)

3. In driving to the result that the securities laws applied, the Court of Appeals was evidently prompted by its strong feeling that such coverage is both necessary and desirable. (App. 24, 33-34, 36, n.40, 37, n.41, 46-51.)⁴¹ But this Court forcefully rejected such result-oriented expansion of the coverage of the securities laws, in *Forman*: "The determination of whether and in what manner federal regulation may be required for housing transactions, where the characteristics of an investment in securities are not present, is better left to the Congress, which can assess both the costs and benefits of any such regulation." (421 U.S. at 859, n.26). The court's error is even more serious here, because, as we next show, Congress has in fact acted on the problem and chosen to deal with it through legislation addressed to the special characteristics of pension plans, rather than by forcing this relationship into the pre-existing mold of the securities laws.

⁴¹ The court below said, "[r]educing to fundamentals, economic reality mandates the realization of the immense importance of private pension plans to the American capital markets." (App. 24.) That proposition is incontrovertible, and the activities of pension funds in the capital markets, that is, the investments made by the plan trustees, are of course subject to the securities laws. But the issue in this case is whether the relationship between involuntary noncontributory pension plans and their participants involves a transaction subject to the securities laws, and it is the economic reality of that transaction on which the decision must turn.

B. The Decision Below is Contrary to the Prior Understanding of the Securities Laws, which Congress Shared in Enacting Specific Legislation Concerning Disclosure by Pension Plans to Employees.

Congress has twice enacted legislation designed to protect the interests of participants and beneficiaries in noncontributory involuntary plans, and dealt therein with the precise problem of the nature and timing of disclosure to which plan participants and beneficiaries are entitled. Congress did so in 1958 in the Welfare and Pension Plan Disclosure Act (WPPDA), and in 1974 more comprehensively through ERISA. On both occasions the SEC disclaimed either authority or expertise concerning collectively bargained pension plans, and it reinforced the Congressional understandings—first (prior to WPPDA), that employees were not at all protected by federal law with respect to information concerning pension benefits, and thereafter (prior to ERISA), that existing law was inadequate, in part because no law provided employees with sufficient information. At no time were the Congressional committees studying pension plans advised that the securities laws (specifically § 17(a) of the 1933 Act and § 10(b) of the 1934 Act) already obligated plan administrators or others to provide employees who obtain or choose to retain employment covered by a collectively bargained pension plan with information concerning that plan, or that those laws dealt in any manner with the relationship between such pension plans and their participants. The committees were told just the opposite. And in both instances they legislated in light of their clearly expressed belief that the federal securities laws are inapplicable to that relationship.

In 1957, two alternative proposals for pension reform were before the Senate. One of these, by Sen. Douglas, would have vested jurisdiction in the SEC, and the other, by Sen. Ives, proposed to vest responsibility in the Department of Labor. The SEC commented in detail on

this proposed legislation. Although it observed that "[b]oth bills provide for disclosure to beneficiaries and to the public"⁴² (*id.* at p. 63), the SEC's Report and Memorandum gave no hint that the SEC believed that such disclosure was already required by the securities laws.

Acting SEC Chairman Andrew D. Orrick testified that "[t]he functions of the Securities and Exchange Commission are devoted to the regulation of the capital securities markets. * * * But the area covered by a bill on welfare and pension funds does not, as such, deal with the capital securities markets."⁴³ Against this background, Congress determined to regulate welfare and pension plans and to vest administrative responsibility in the Department of Labor rather than the SEC. See the Senate Report quoted by the court below, (App. 44, n.53).

In 1965, the President's Committee on Corporate Pension Funds filed a unanimous report, joined by the Chairman of the SEC, Mr. Manuel F. Cohen, which recommended legislation for increased disclosure to, and reme-

⁴² Hearings Before the Subcommittee on Welfare and Pension Plan Legislation of the Senate Committee on Labor and Public Welfare, 85th Cong., 1st Sess., pp. 62 *et seq.*

In the previous Congress, the Subcommittee had issued a report which stated:

Thus, with the exception of the ineffective sections of the Labor-Management Relations Act, 1947, and the Internal Revenue Code, as discussed above, there presently exists no Federal statute, regulation, or authority which attempts to protect the rights of the beneficiaries of welfare and pension plans.

S. Rep. 1734, 84th Cong., 2nd Sess., 60 (1956).

⁴³ *Id.* p. 107. The same views were expressed in an SEC staff memorandum, (*id.* at 119, quoted in part at App. 44, n.53) which said also:

Many of the plans involved in this legislation are the fruits of collective bargaining. Accordingly, these plans are inseparably intertwined with labor-management relations. Abuses in this area then have their main effect upon an economic area in which the Commission does not possess expertise.

dies for, pension plan beneficiaries." And in 1972, the then SEC Chairman, Mr. William J. Casey stated in a letter to the Subcommittee which was responsible for what became ERISA:

"[W]e believe that employee benefit plans *should* be subject to the requirement of adequate disclosure of investment returns based upon appropriate adjustment for volatility. In this way, the participants as well as the Secretary of Labor would be advised of the extent to which the plan's investment assets were being subjected to varying degrees of investment risk."⁴⁵

These recommendations would have been pointless if Messrs. Cohen and Casey had believed that the 1933 and 1934 securities laws already required disclosures from involuntary noncontributory pension plans to their participants.⁴⁶

⁴⁴ The President's Committee recommended "a requirement for the disclosure of additional information related to the investment activities of retirement plans, by amendment of the Welfare and Pension Plans Disclosure Act. Disclosure of investment holdings and activities in much more detail than is now required, *perhaps in the same manner as is required of investment companies under S.E.C. regulation*, would seem useful and entirely feasible without impairment of retirement plan operations. President's Committee on Corporate Pension Funds, *etc.*, *Public Policy and Private Pension Programs—A Report To The President on Private Employee Retirement Plans* (1965), p. 78.

⁴⁵ (Emphasis added) S. Rep. No. 92-1150, 92d Cong., 2d Sess. 68.

⁴⁶ The court says "that the SEC has historically *advocated* a hands-off approach to the regulation of pension plans with respect to disclosure requirements holds no brief for exempting pension plans from the anti-fraud provisions of the securities acts." (App. 44, our emphasis). But the statements of the SEC cannot accurately be so described. The SEC did not favor a general "hands-off" policy; on the contrary, as we have seen, in 1972 its Chairman affirmatively recommended that legislation governing disclosure by pension plans to their participants be enacted; and in 1957 what it advocated was that jurisdiction over such regulation be vested in an agency with greater competence over the subject than the Commission, not that no such legislation should be enacted. More significantly, the Commission's observations were not mere "advocacy" but rather were

At the outset of its investigation that Senate Subcommittee had caused a detailed analysis to be made of all legislative regulation of pension plans, the results of which were set forth in the 1971 Interim Report⁴⁷ and were then carried forward in subsequent committee reports in both bodies, in a summary entitled "*The Existing Law*".⁴⁸ The majority opinion interpreted the Report's discussion of the role of the securities laws as stating only that the *registration* requirements of the 1933 Act were deemed to be inapplicable, and not that the anti-fraud provisions of both Acts are inapplicable (App. 43-44). It described the failure to make this distinction as "defendants' quintessential error," (App. 44) but it is plainly the majority below which erred. For, the Interim Report stated that "pension and profit sharing plans are exempt from *coverage* under the Securities Act of 1933 * * * unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer."⁴⁹ The Court's reading is also inconsistent with other portions of the Interim Report which depict the peripheral role of the SEC⁵⁰ and

disclaimers of authority under the then-existing state of the law, which in the context of the proposals before Congress on those occasions could only have been understood as assertions that no legislation for which it was then responsible involved the protection of the rights of participants and beneficiaries under collectively bargained pension plans.

⁴⁷ Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92d Cong., 2d Sess. (1972).

⁴⁸ S. Rep. No. 93-127, 93rd Cong., 1st Sess., 4-5 (1973), I ERISA Leg. Hist. 587, 590-591; H.R. Rep. No. 93-533, 93rd Cong., 1st Sess., 3-5 (1973), II ERISA Leg. Hist. 2348, 2350-2352.

⁴⁹ Interim Report at 96 (our emphasis). The fact that the Report also observed that those plans which are covered must be "*registered*" (court's emphasis) cannot narrow the word "*coverage*" to encompass only the registration requirements.

⁵⁰ Only the Labor Department and the Treasury Department (through the Internal Revenue Service) were considered to have

which do not even mention the securities laws in the section entitled "Legislative Regulation".⁵¹

The majority below notes that "the Congress that enacted ERISA" was not "unaware that the SEC considered interests in pension funds to be securities under the 1933 Act unless excepted." (App. 44, n.53, referring to the Institutional Investor Study, hereinafter "SEC Study"). However, as Judge Tone recognized (App. 52), Congress' awareness of the SEC Study cuts *against* the conclusion that Congress believed the anti-fraud provisions to be applicable and only the registration provisions to be inapplicable. For the SEC Study also declared that "the Commission Staff has taken the position that the Securities Act *does not apply* because there is no 'sale' or 'offer of sale' of a security."⁵² That the Study correctly described the SEC's consistent interpretation of the laws which it is directed to enforce is confirmed by the SEC's actual practice: The Commission *never* exercised the authority it now claims; it *never* regulated noncontributory involuntary pension plans under the anti-fraud provisions of the 1933 and 1934 Acts, either by rules, or interpretive guidelines, or enforcement pro-

"any degree of control over the administration and operation of private pensions." Interim Report, at 91.

⁵¹ Interim Report, at 23-29. The summaries in the Reports cited at p. 36, n.48, *supra*, stated "there are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities." They listed the WPPDA of 1958, the Labor-Management Relations Act of 1947, and the Internal Revenue Code.

⁵² SEC Study, p. 996, emphasis added. The foregoing is contained in a subsection entitled "(1) Corporate pension and profit-sharing plans—(a) Plans not providing for voluntary contributions." (*Id.*) In the next subsection, "(b) Plans providing for voluntary employee contributions" (*id.* at 997) the SEC Study described the Commission's no-action position with respect to "registration" of participations in certain voluntary contributory plans.

ceedings. (See 1933 Act §§ 19(a), 20, 24; 1934 Act §§ 21, 23(a) (1)).

In sum, Judge Tone was clearly right when he stated, "Members of Congress considering legislative proposals after the adoption of the securities acts who relied on the SEC's interpretation of those acts must have understood that they did not apply to transactions of the kind before us." (App. 52, concurring opinion).⁵³ He declined to give

⁵³ The majority below read a 1970 amendment to § 3(a)(2) of the 1933 Act as approving what the court considered to be the SEC's practice of exempting involuntary noncontributory pension plans from registration, but subjecting them to the anti-fraud provisions. As some of the manifold objections to that interpretation are discussed at pp. 22 to 28 of Local 705's Petition, we shall here merely note the major inadequacies in the court's opinion.

One of these has already been mentioned: the court's opinion is internally inconsistent with respect to whether all or some pension plans are now exempt, and if only some are, whether all plans qualified under § 401 of the Internal Revenue Code, are exempt, or only qualified plans maintained by a bank or by an insurance company account. Contrast App. 27, App. 28, n.34 and App. 50, n.61, which we discuss at pp. 14-16, *supra*. *Second*, the court bases its interpretation on the proposition that § 3(a)(2) was subject to a fundamental change of focus when the House Committee added the words "single or" (App. 31) but does not mention that the Springer-Moss colloquy, which was clearly intended to explain the addition of those words, authoritatively states that they changed the meaning of the exemption only "slightly." 116 Cong. Rec. 33287 quoted in Local 705's Petition. *Third*, the court cites no reference in the legislative history which shows that Congress even knew of the existence of the administrative practice which was assertedly being codified; this omission is not due to oversight, but was unavoidable because there is no such reference. *Fourth*, the court does not even reflect upon the inherent unlikelihood of its scenario, whereby Congress changed the whole focus of major legislation on the basis of a letter from one attorney, without hearing from any of the numerous parties who would be affected, and without spelling out in debate or committee report precisely what it had done. *Finally*, the court's interpretation of the 1970 amendment is flawed by its failure to recognize that the 1971 Institutional Investor Study describes an administrative practice which, insofar as pertinent here, is the precise opposite of that which the court says was codified in 1970, see p. 37, *supra*.

controlling weight to that fact, however, because he attributed to Congress the understanding that the question was open in "the Supreme Court [which] has been known to disagree with" the SEC, and that it "appears likely that Congress has chosen to leave the matter in that posture." (App. 53, concurring opinion). We submit that it is most unlikely that Congress made that choice. There is simply no evidence in the legislative record to justify the surmise that Congress even contemplated the possibility that the securities laws might apply to the relationship between involuntary noncontributory pension plans and their participants. Its description of "the existing law" in the final reports issued by the respective committees of the House and Senate (see p. 36, n.48, *supra*) evidences that Congress was confident that it was entering an area in which there were no existing federal laws, except for the Internal Revenue Code and WPPDA, which were substantially superseded by ERISA, and the NLRA which simply prescribes the structure of collectively bargained plans. Moreover, if Congress had been given any reason to entertain a doubt on this score, it most probably would have taken steps to prevent the securities laws from expanding into this area, for the avoidance of bureaucratic duplication and conflict was one of Congress' principal objectives.⁵⁴ At the very least, when one pro-

⁵⁴ See, *e.g.*, ERISA § 3004 quoted at p. 20, *supra*. See also, *e.g.*, Senator Williams' explanation of the bill which was enacted:

One of the thornier problems confronted by the conferees was the question of arranging a workable administrative and enforcement structure that would incorporate the historic role of the Internal Revenue Service with respect to qualified plans as well as the broader role visualized for the Labor Department in terms of safeguarding the interests of participants and beneficiaries and applying its expertise in connection with collectively bargained plans and matters impinging on the field of labor relations. By carefully assigning specific functions to each agency, the Senate bill tended to create a dominant role for each agency and minimize the degree of overlapping. III ERISA Leg. Hist. 4770.

ceeds, as Judge Tone did, from the understanding that this is apparently the first time that the SEC has taken the position "that the employee's interest or expectancy in a plan such as this is subject to the anti-fraud provisions of the securities laws" (App. 52), one must agree with him that "this is a close and difficult case." (App. 51).

The majority below, however, accepted the SEC's revisionist history, of which Judge Tone perforce said: "The Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position." (App. 52). In consequence, the majority gave the Commission's present views far greater weight than they deserve under the circumstances (see *e.g.*, *Forman*, 421 U.S. 837, 858, n.25, followed in *General Electric Co. v. Gilbert*, 429 U.S. 125, 143; *Piper v. Chris-Craft Industries*, 430 U.S. 1, 41 n.27) and insufficient weight to the position which the SEC took in the first forty years. (See also *Hochfelder*, 425 U.S. at 212-214; Compare *Labor Board v. Drivers' Local Union*, 362 U.S. 274, 292.)

But the paramount importance of this history stems from the fact that Congress has twice enacted pension legislation in reliance on the SEC's existing interpretation. Even as the SEC "is not now free"⁵⁵ to assert that the securities laws regulate this subject, so, too, is the courts' freedom circumscribed, for the principled basis of this rule of construction is not that the agency should be estopped, but that the manifested Congressional will should be enforced. Thus even if, as Judge Tone apparently believed, the securities laws are so elastic that the

⁵⁵ *Bell Aerospace Co. Div. of Textron, Inc. v. NLRB*, 475 F.2d 485, 494 (C.A. 2), (Friendly, J.), quoted with approval and affirmed on this point, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289. Judge Friendly concluded, based on a careful examination of this Court's precedents, that "when an administrative construction has been long in effect, the agency cannot make a big change, especially after a reenactment or substantial amendment, but can make smaller ones."

courts could permissibly have applied them to reach involuntary noncontributory pension plans absent intervening Congressional action, the enactment of WPPDA and ERISA under the circumstances detailed herein forecloses this choice. These laws embody Congressional policies concerning the regulation of pension plan disclosure which the courts may not override and frustrate by rejecting the assumptions on which Congress justifiably proceeded. Compare *Califano v. Sanders*, 430 U.S. 99, 105-108.⁵⁶

In sum, the court below has attributed to the 73rd Congress a legislative intent far beyond "the focus of the [1933 and 1934] Acts [which] is on the capital market of the enterprise system" (*Forman*, 421 U.S. at 849), and it has substituted for the determinations of the 93rd Congress its own strongly-felt views that the antifraud provisions of the securities laws should "supplement ERISA" to protect employees, whom it called "investor[s]", in making what it called "an investment decision." (App. 46-47).

⁵⁶ The Court of Appeals accepted the argument in the SEC's brief that the "no-sale" theory should be abandoned because it is now generally recognized that a noncontributory pension plan is not a gift. But here again the court below failed to apply the precepts laid down by this Court. "In interpreting the statute it is not our task to consider whether Congress was mistaken" in 1933 and 1934 in its view of the nature of a noncontributory involuntary pension plan: "rather, we must construe the statute in light of the impressions under which Congress did in fact act." *Moor v. County of Alameda*, 411 U.S. 693, 709; see also *Brown v. GSA*, 425 U.S. 820, 828; *Califano v. Sanders*, 430 U.S. 99, 107 n.7. It is especially unfitting for the courts to attribute the present, more sophisticated appreciation of the nature of these pension plans to the 73rd Congress because when later Congresses also rejected the "gift" theory, they concluded not that the securities laws should govern but that special pension legislation was necessary.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

Blassie v. Amalgamated Meat Cutters and Butcher Workmen of North America Retirement Plan and Trust Fund, etc., et al., No. 76-C-681 (N.D.Ill.)

Cinnamon v. Brooks, et al. and Southern California Retail Clerks Unions and Food Employers Joint Pension Trust Fund, No. CV-77-204 LTL (C.D.Cal.) [Counterclaim based upon the federal securities laws dismissed on May 20, 1977; on November 8, 1977, the court dismissed the amended counterclaim which relied upon the Seventh Circuit's decision in *Daniel*]

Coffey v. McCarthy, et al. and New England Teamsters and Trucking Industry Pension Fund, No. 77-1863-C (D. Mass.)

Crabtree v. International Brotherhood of Teamsters, et al. and Central States, Southeast and Southwest Areas Pension Fund, No. 76-610 (E.D.Ky.)

Dutchak, et al. v. International Brotherhood of Teamsters, et al. and Central States, Southeast and Southwest Areas Pension Fund, No. 76-C-3803 (N.D.Ill.) [class action]

Hurn v. Retirement Fund Trust of the Plumbing, Heating and Pipe Industry of Southern California, No. 76-2487-AAH (C.D.Cal.) [Count based upon federal securities laws dismissed; see 424 F.Supp. 80]

McCart, et al. v. Hartzer, et al. and Central States, Southeast and Southwest Areas Pension Fund, No. 76-292-1 (S.D.Iowa)

O'Neil v. Marriott Corporation, et al., No. M-77-495 D.Md.) [class action involving Marriott Corporation Employees Trust]

Papuga v. International Brotherhood of Teamsters, et al. and Local 705 Pension Fund, No. 77-C-2327 (N.D.Ill.)

Patton v. Central States, Southeast and Southwest Areas Pension Fund, et al., No. C-76-1354 (N.D.Ohio)

Pliner v. Central States, Southeast and Southwest Areas Pension Fund, et al., No. C-77-55 (N.D.Ohio)

Robinson v. United Mine Workers of America Health and Retirement Funds, et al., Civ. No. 77-0698 (D.D.C.) [class action; securities law count dismissed; see 435 F.Supp. 245]

Ross v. International Brotherhood of Teamsters and Western Conference of Teamsters Pension Trust, et al., No. C-77-1650-RFP (N.D.Cal.)

Schlansky v. United Merchants and Manufacturers, Inc., Civ. No. 76-5799 (S.D.N.Y.) [class action involving Pension Plan and Group Life Insurance Plan for Employees]

Skytt, et al. v. Waggoner et al. and International Union of Operating Engineers Pension Trust, No. 77-1550 RMT (C.D.Cal.) [class action]

Stoelzing v. Robbins, et al. and Central States, Southeast and Southwest Areas Pension Fund, No. 77-0464-CV-W-4 (W.D.Mo.)

Wiens v. International Brotherhood of Teamsters, et al. and Western Conference of Teamsters Pension Fund, No. 76-2517-IH (C.D.Cal.) [Securities law counts dismissed; see BNA Securities Law Reporter (No. 397, April 6, 1977, p. A-13)]